No. 7.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

GAYNOR NEWS COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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On May 25, 1953, the Court ordered this case restored to the docket for reargument, 345 U. S. 962. Gaynor News Company, Inc. submits this supplemental brief in reply to the one filed by the Board, for consideration on the reargument.

I.

Discrimination alone is not sufficient to constitute a violation of Section 8(a)(3), but it must be discrimination ". . . to encourage or discourage membership in any labor organization."

A. The Board concedes that there was no purpose or motive "to encourage" union membership in this case.

The Board has now apparently shifted its position and admits that the Petitioner's conduct was not motivated, nor did it have as its purpose, the "encouragement" of

membership in any labor organization (Board's supplemental brief, p. 4). On page 12 of the supplemental brief, the Board states:

> "We therefore grant that the company's purpose was to save money rather than to encourage Union membership as such; . . ."

However, the Board's position appears to be that purpose and motive are not material, in spite of the overwhelming precedents to the contrary (see our original brief in this Court, pages 22-24). The element of purpose has always been considered so integral a part of the unfair labor practice prohibited by Section 8(a) (3) that the Board's Trial Examiners as recently as July, 1953 still required a showing of unlawful purpose before sustaining an 8(a) (3) violation.[1] Evidently the Board recognizes at this late date

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[1] *In the Matter of Wagner Electric Corp.* v. *Local 23, American Federation of Technical Engineers, A. F. L.*, 105 NLRB 3, a similar charge arose in which respondent was accused of "discouraging" union membership by disparate treatment. There the discrimination was admitted by respondent as it is in the present case. However, the motives which dictated the discrimination were in dispute. The Trial Examiner, in analyzing these circumstances, stated as follows:

> "The question is whether Respondent in determining its policy, was *motivated* by a desire to discriminate against Union members in favor of its non-organized employees. . . . *Disparity of treatment, there was; but disparity of treatment is not the equivalent of discrimination.* . . . There is nothing here to show that this disparate treatment was caused by anything else than respondent's own conception of sound business policy." (Emphasis supplied.)

In another case decided in July, 1953, in which a similar situation arose, the Trial Examiner also indicated that in his opinion illegal purpose was an essential ingredient required to constitute a Section 8(a) (3) violation. *Cities Service Refining Corp.* v. *Office Employees International Union, Local 87, A. F. L.*, 105 NLRB 124. There, too, disparity was admitted but the motivation for the disparity was disputed. The Trial Examiner stated as follows:

> "It is *only* when the grant to the one, and not to the other, is *motivated* by a *purpose* unlawful under the Act, that the

its inability to establish illegal purpose and therefore concedes its non-existence. However, in its original brief before this Court, it stated that purpose or motive must be shown only where the ultimate fact of disparity is in question. It further stated that when discrimination is admitted, motive or purpose is immaterial (Board's original brief, p. 31).

In its brief before the Court of Appeals, the Board expressed the same idea, at page 9, as follows:

> "However, the inquiry into the employer's motivation in all of those cases was material only as an aid in determining the ultimate fact admitted here, —that union affiliation, or lack of it, prompted the discrimination. *Because an employer may discriminate for any reason other than union or concerted labor activities, the employer's motivation becomes a critical ancillary issue whenever he contends that his conduct was motivated by factors other than union activity.*" (Emphasis supplied.)

In the instant case, the employer contended again and again that its conduct was motivated by business reasons and not by union activity (R., pp. 61-62, 104, 111-112). Yet these offers of evidence were held to be immaterial by the Board.

In the two recent cases cited in Footnote 1, the discrimination was also admitted, but the Trial Examiners still went on to require a showing of unlawful purpose.

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privilege is lost and the disparity becomes illegally discriminatory. *But absent an unlawful purpose, a violation of Section 8(a) (3) may not be concluded from such disparity standing alone.*" (Emphasis supplied.)

The Trial Examiner sought to distinguish this analysis from the *Gaynor* case by stating that the discrimination in the *Gaynor* case was discrimination *per se*. At best this is an artificial distinction since no Court has yet defined the term "discrimination *per se*".

The critical issue to be determined where a Section 8(a) (3) violation is charged is whether "encouragement or discouragement" of membership in any labor organization occurred. It is *encouragement* which is forbidden, not mere discrimination. Discrimination alone is forbidden in other sections of the statute. For example, the second proviso in Section 8(a) (3) states:

> ". . . provided, further, that no employer shall justify any discrimination against an employee for non-membership in a labor organization . . ."

There discrimination, as such, is forbidden. Since an 8(a) (3) violation cannot arise unless the employer's conduct was directed toward encouraging or discouraging union membership, or had that effect, it is difficult to perceive how purpose and effect can be immaterial as claimed by the Board.

B. There is no evidence in the record to sustain the claim that the disparity complained of here would or did have the prohibited result of encouragement.

The original finding of the Board seems to indicate that mere disparity alone, along Union lines, is sufficient to constitute a violation of Section 8(a) (3). The Board stated in its decision:

> "While this new evidence indicates that the Respondent had contracted to make retroactive wage payments to the employees covered by the original contract, it does not affect the validity of the Trial Examiner's basic conclusion, with which we agree, that the contract affords no defense to the allegation that *the Respondent unlawfully engaged in disparate treatment of employees on the basis of union membership, or lack of it,* as there is nothing in the supplemental agreement of October 9, 1947, which pro-

> hibits equal payments to non-union employees" (R., p. 9). (Emphasis supplied.)

The Trial Examiner expressed this identical proposition more cogently by stating:

> "The gist of the discrimination with which the Respondent is charged is not for the granting of retroactive payments to the union employees, but rather the *disparate treatment* accorded the non-union men" (R., p. 26). (Emphasis supplied.)

This position completely ignores the crucial issue herein, which is the *encouragement* and not merely the "discrimination in employment" as the Board contends at page 12 of its supplemental brief. The prohibited result is *encouragement* and, if the conduct complained of did not have the prohibited effect of encouragement, then there cannot be a violation of Section 8(a) (3). Yet the entire record fails to reveal an iota of evidence to support the claim that the disparity complained of did, in fact, result in encouragement. The essential element is encouragement and yet the record is barren of any attempt by the Board to prove this basic statutory requirement; and what is worse, all offers of evidence by Petitioner to disprove encouragement were rejected (R., pp. 105-109, 117-120).

The Board contends that from mere disparity, it can infer encouragement. However, offers of concrete evidence to rebut this inference were made by Petitioner and rejected by the Trial Examiner who thereupon based his conclusions on the inferences alone (R., pp. 105, 109, 117-120). This is a denial of due process and an attempt by the Board to shift the burden of proof to the Petitioner. Since the prohibited result is "encouragement", it was the Board's duty to introduce evidence that encouragement has,

in fact, occurred. Instead, the only authority for this point consists of its own conclusion that the fact of disparity necessarily tends toward encouragement, thus shifting the burden of proving no encouragement to the Petitioner.

Unless there is evidence in the record to prove the fact of encouragement, the Board's findings must be overruled. The Board may not substitute its own alleged "expertness" for proof (see our original brief in this Court, pages 29-32).

The Board states in its supplemental brief, at page 13, that Section 8(a) (3) prohibits

> ". . . discrimination which is based upon union membership or activity *and* which results, *in fact,* in encouragement or discouragement of membership." (Emphasis supplied.)

With this statement, we concur wholeheartedly. But the fact of encouragement has never been proven in this case and all offers of evidence to the contrary were rejected (R., pp. 105-109, 117-120). The anachronism of finding the Petitioner guilty of encouraging a result, without any proof that the conduct complained of accomplished that result, is further compounded by the fact that the prohibited result was impossible of accomplishment under the unique circumstances herein.

In another case in which a violation of Section 8(a) (3) was charged on the grounds of disparate treatment, the Court held that, in addition to discrimination, there must also be sufficient evidence to prove the facts of encouragement or discouragement to sustain the Board's order. *NLRB* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 41, A. F. L.* (C. C. A. 8, 1952), 196 F. 2d 1 (certiorari applied for and granted, No. 301, October Term 1952, pend-

ing reargument as No. 6, October Term 1953). After concluding that the discrimination practiced did not "encourage or discourage membership in any labor organization", the Court stated, at page 4, as follows:

> "Having considered the record as a whole, we can find no substantial evidence to support the conclusion that the discrimination in regard to the tenure or condition of employment of Boston [the employee] did or would encourage or discourage membership in any labor organization. The testimony of Boston refutes such a conclusion. Theoretically, such an act might have such an effect. But in this case we can find no substantial evidence that it did or would have such effect. 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' [Citations] It must do more than create a suspicion of the existence of a fact to be established . . . ".

No act of the employer could have constituted further inducement to union membership since the employees affected had already done everything in their power to obtain such membership, had been rejected, and were, in fact, ineligible under the Union's Constitution (R., pp. 105-109, 118-120).[2] The end result of encouragement outlawed by Section 8(a) (3) was, in fact, impossible of achievement. The Circuit Court of Appeals for the Eighth Circuit, in dealing with the same type of situation, held that under such circumstances, the employer could not be

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[2] In the Board's supplemental brief, at page 4, footnote 2, they refer to the fact that certain amendments were made in the Union's Constitution which open the door for increased Union membership. Changes in the Union's Constitution referred to in the *Jersey Coast* case took place four years after the events of this case and obviously have no merit in this argument which arose during the lawful closed shop period of the Wagner Act days.

guilty of "encouraging union membership" *NLRB* v. *Del E. Webb Construction Co., et al,* 196 F. 2d 702 (1952). That Court stated, at page 706, as follows:

> "So in the instant case, it being impossible for Pickard to become a member of the Respondent union, nothing that Respondent company might do by way of discriminating against him could be said proximately to encourage him to join a union which was impossible for him to join. There can be no violation of this Statute [Section 8(a) (3)] unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization . . . [Citations]."

To epitomize the utter hopelessness of the employer's position in these circumstances, we need merely consider the only other alternative open to the employer; namely, to pay the retroactive wage and vacation benefits to its non-union employees. Such a course of action, under the Board's interpretation, would certainly leave the employer open to the charge that he was *discouraging* union membership. If the non-union employees could obtain all benefits granted the union employees, even though they were not members of the union, surely such conduct by the employer would be "conducive toward" and "have a natural tendency to" discourage union membership. Thus, under the Board's analysis of Section 8(a) (3), an employer straddles the horns of an insoluble dilemma. If he does *not* pay the benefits to his non-union men, he is guilty of encouraging them to join the union; if he *does* pay the benefits, he is guilty of discouraging union membership. Petitioner submits that Congress never intended to place an employer in the throes of such an illogical and paradoxical situation.

Conclusion.

For the reasons stated, the judgment of the Court below should be reversed and the order of the Board denied enforcement.

Respectfully submitted,

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